LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 21 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-809

ANGELO ROSSI, JR., ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MORRIS M. GOLDINGS,
Attorney for Petitioners,
500 Boylston Street,
Boston, Massachusetts 02116.
(617) 261-2300

ADDISON C. GETCHELL & SON, INC. • THE LAWYERS' PRINTER • BOSTON

Table of Contents.

Opinion below 1

Jurisdiction 2

Questions presented 2

Constitutional provisions, statutes and rule involved 3

Statement of the case

- The indictment 4
- The record 8
- Pretrial proceedings and the facts related thereto 8
- The conduct of the trial and the facts related thereto 10
- The requested jury instructions 17

Reasons for granting the writ 18

1. In the totality of the circumstances of this case, the petitioners were denied substantial due process of law and a fair and impartial speedy trial, as mandated by the Fifth and Sixth Amendments to the Constitution, especially in light of the proceedings incident to the mistrial of the defendant Salerno 18
2. It was prejudicial error for the trial judge to refuse to submit to the jury, as requested by petitioners, the factual issues of the nature and scope of the conspiracy count as constituting a single or multiple conspiracy and petitioners' requested jury instructions thereon; the proof established as a matter of law that there were several separate and distinct conspiracies 21
3. As a matter of law there was a material variance between the allegations of the conspiracy count and the proof submitted in sup-

port thereof as to petitioners' participation in the scheme by their alleged sales to the conspiracy 25

4. In the circumstances of this case the failure of the district court and the government to afford petitioners a speedy trial violated their constitutional rights guaranteed by the Sixth Amendment to the Constitution, as delineated by this court's decision in *Barker* v. *Wingo,* 407 U.S. 514 (1972) 28

Conclusion 30

Motion to defer consideration of petition for a writ of certiorari 31

Appendix A 33

Appendix B 39

Table of Authorities Cited.

Cases.

Barker v. Wingo, 407 U.S. 514 28

Berger v. United States, 295 U.S. 78 (1935) 20

Bruton v. United States, 391 U.S. 123 (1968) 25

Chambers v. Florida, 309 U.S. 227 (1940) 20

Delli Paoli v. United States, 352 U.S. 232 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 20

Kotteakos v. United States, 328 U.S. 750 (1964) 23, 24

Lefco v. United States, 74 F. 2d 66 (3d Cir. 1934) 21, 22

Mooney v. Holohan, 294 U.S. 103 (1935) 20

Moore v. Arizona, 42 U.S.L.W. 3268 (1973) 29

Moore v. Dempsey, 261 U.S. 86 (1923) 19
In re Murchison, 349 U.S. 133 (1955) 21
Offutt v. United States, 348 U.S. 11 (1954) 21
Rochin v. California, 342 U.S. 165 (1952) 20
Sheppard v. Maxwell, 384 U.S. 333 (1966) 20
Smith v. O'Grady, 312 U.S. 329 (1941) 20
United States v. Borelli, 336 F. 2d 376 (2d Cir. 1954) 21
United States v. Boyance, 329 F. 2d 372 (3d Cir. 1964) 21, 22
United States v. Carlucci, 288 F. 2d 691 26
United States v. Crosby, 294 F. 2d 928 (2d Cir. 1961) 21
United States v. DeCarlo, 458 F. 2d 358 28
United States v. DeCavalcante, 440 F. 2d 1264 (3d Cir. 1971) 21, 26
United States v. Falcone, 311 U.S. 205 (1940) 25, 26
United States v. Ford, 324 F. 2d 950 (7th Cir. 1963) 26
United States v. Gerke, 125 F. 2d 243 (3d Cir. 1942) 26
United States v. Giuliano, 263 F. 2d 582 26
United States v. Griffin, 464 F. 2d 1352 (9th Cir. 1972) 24
United States v. Koch, 113 F. 2d 982 (2d Cir. 1940) 26
United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938) 25
United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969) 21, 23, 26
United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943) 26
Waley v. Johnson, 316 U.S. 101 (1942) 20

STATUTES.

United States Constitution, Fifth Amendment 21
United States Constitution, Sixth Amendment 9, 21
Title 28, United States Code, § 1254(1) 2

MISCELLANEOUS.

Federal Rules of Criminal Procedure, Rule 12(b)2 9
Federal Rules of Criminal Procedure, Rule 14 9, 25
Federal Rules of Criminal Procedure, Rule 33 2, 30
Federal Rules of Criminal Procedure, Rule 48(b) 9
Note, Falcone Revisited; The Criminality of Sales to an Illegal Enterprise, 53 Col. L. Rev. 26

In the Supreme Court of the United States

October Term, 1973.

No.

ANGELO ROSSI, JR., et al.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Angelo Rossi, Jr., Howard Silverman and William Silverman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 25, 1973.

Opinion Below.

The opinion of the Court of Appeals in this case has not yet been reported. It is reprinted as Appendix A hereto, *infra.*

Jurisdiction.

The judgment of the Court of Appeals was entered on September 25, 1973. A timely petition for rehearing and for rehearing *in banc* was denied on October 24, 1973. The judgment of the Court of Appeals and the orders denying rehearing and rehearing *in banc* and petitioners' motion to remand to the district court so that said district court may entertain and grant pursuant to Rule 33, Federal Rules of Criminal Procedure, a motion for new trial based upon newly discovered evidence, are reprinted as Appendix B, *infra*. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented.

1. Whether, in the totality of the circumstances of this case, petitioners were denied substantial due process of law and a fair and impartial speedy trial, as mandated by the Fifth and Sixth Amendments to the Constitution, especially in light of the proceedings incident to the mistrial of defendant Salerno.

2. Whether it was prejudicial error for the trial judge to refuse to submit to the jury, as requested by petitioners, the factual issues of the nature and scope of the conspiracy count as constituting a single or multiple conspiracy, and petitioners' requested jury instructions thereon; and whether the proof established as a matter of law that there were several separate and distinct conspiracies.

3. Whether as a matter of law there was a material variance between the allegations of the conspiracy count and the proof submitted in support thereof as to petitioners' participation in the scheme by their alleged sales to a conspiracy.

4. Whether, in the circumstances of this case, the failure of the district court and the government to afford petitioners a speedy trial violated their constitutional rights guaranteed by the Sixth Amendment to the Constitution, as delineated by this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972).

Constitutional Provisions, Statutes and Rule Involved.

CONSTITUTION OF THE UNITED STATES.

Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

TITLE 18, UNITED STATES CODE.

§ 2. Principals.

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

§ 371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire to commit any offense against the United States, or to defraud the United States,

or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 48. Dismissal.

. . . . . .

(b) By Court.

"If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Statement of the Case.

THE INDICTMENT.

The indictment in this case, filed on March 4, 1970, contained nine counts: one conspiracy and eight substantive counts. The conspiracy count alleged a single continuous

overall conspiracy among all the defendants between on or about January 1, 1968, and on or about December 31, 1969. In substance it charged as follows:

Defendants Anthony "Fat Toni" Salerno, Angelo "Butch" Rossi, Jr., Gilbert Lee Beckley, Joseph Green, Howard Silverman, William Silverman, Jacob Mase (Maislich), Larry Bressler and Gerald Martin Zelmanowitz, conspired to violate Title 18, United States Code, § 2314, in that the defendants would transport and cause others to transport in interstate and foreign commerce securities of the value of $5,000 and more, knowing the same to have been stolen, converted or taken by fraud; also with fraudulent intent to transport and cause others to transport in interstate and foreign commerce, falsely made, altered and counterfeited securities, knowing the same to have been falsely made, altered and counterfeited.

The operative allegations of the conspiracy count alleged as follows:

> "It was part of said conspiracy that the defendants BECKLEY, GREEN, SALERNO and ZELMANOWITZ met and agreed that the defendants BECKLEY, GREEN and SALERNO would arrange for the procurement of large quantities of stolen securities from the defendants WILLIAM SILVERMAN, HOWARD SILVERMAN, JACOB MAISLICH and ANGELO ROSSI, JR., and that the defendant ZELMANOWITZ would, in their behalf and on his own behalf, and with the assistance of the defendant BRESSLER, transport such securities in interstate and foreign commerce for the purpose of selling such securities and that the defendant, SALERNO, by virtue of his criminal associations and contacts, would guarantee the timely procurement of such stolen securities and provide such protection as was necessary for said enterprise. It was a further part of said conspiracy

that the defendants (GREEN, BECKLEY, ZELMANOWITZ and SALERNO) would agree that they would each take a share of the proceeds of the sale of said stolen securities.

"It was a part of said conspiracy that the defendants WILLIAM SILVERMAN, HOWARD SILVERMAN, JACOB MAISLICH and ANGELO ROSSI, JR. agreed to furnish stolen securities to the defendants GREEN, BECKLEY, SALERNO and ZELMANOWITZ.

"It was further part of said conspiracy that the defendants would agree that the defendant, ZELMANOWITZ would alter, forge, and change the appearance of said stolen securities, and that he and the defendant BRESSLER would thereafter transport such securities in interstate commerce all for the purpose of fraudulently selling said stolen securities."

Eighteen overt acts were allegedly committed as being in furtherance of said conspiracy. Petitioner Rossi was named in Overt Acts 6, 7, 8 and 12, while the petitioners Silverman were named only in Overt Act 9. For the most part, the overt acts detailed the criminal conduct of defendant Zelmanowitz, the principal witness for the government in this and other unrelated criminal cases.

The eight substantive counts were really separate overt acts of the alleged conspiracy, and contained a common nucleus of defendants named in each such count: Anthony Salerno, Gilbert Lee Beckley, Joseph Green and Gerald Martin Zelmanowitz. The remaining defendants were named in different unconnected diverse counts, as follows:

Count 2: Mase (Maislich), transportation of 17 stolen Kansas City Municipal Bonds of approximate value of $85,000, between April 15 and April 28, 1968, from New York to New Jersey.

Count 3: Rossi, transportation of $280,000 stolen U. S. Treasury bonds, between May 1 and May 20, 1968, from New York to New Jersey.

Count 4: Howard Silverman and William Silverman, transportation of $404,000 face amount, $280,000 approximate value stolen Indiana Toll Road bonds, between June 4 and June 12, 1968, from New York to New Jersey.

Count 5: Howard Silverman and William Silverman, transportation of $404,000 face value counterfeit Indiana Toll Road bonds, between June 4 and June 12, 1968, from New York to New Jersey.

Count 6: Rossi, transportation of $1,100,000 stolen General Electric, Standard Oil New Jersey, American Motors securities, between June 15 and November 1, 1968, from Massachusetts to New Jersey.

Count 7: Rossi and Bressler, transportation of $1,100,000 stolen General Electric, Standard Oil New Jersey and American Motors securities, between November 4, 1968 and March 4, 1969, from New Jersey to Florida.

Count 8: Rossi and Bressler, transportation of $1,100,000 stolen General Electric, Standard Oil New Jersey, American Motors securities, between November 1, 1968 and March 4, 1969, from New Jersey to Georgia.

Count 9: Rossi and Bressler, transportation of $1,100,000 stolen General Electric, Standard Oil New Jersey and American Motors securities, between November 1, 1968 and March 4, 1969, from New Jersey to Louisiana.

It is to be noted that counts 4 and 5, in which only the Silvermans and the nucleus defendants were named, refer to the same transaction, with count 4 alleging that the

transportation was of stolen bonds, while count 5 alleged the transportation of the same bonds, but as counterfeit. At the commencement of the trial the government dismissed count 4; and at the end of the proof, before submitting the case to the jury, the trial judge granted the Silvermans' motion for judgment of acquittal as to count 5. Thus the Silvermans were in the case only as to the conspiracy count when it was submitted to the jury.

The Record.

The record consists of all the proceedings in the district court, including pretrial motions and proceedings; the trial testimony and exhibit received in evidence; and posttrial proceedings. The record is not yet complete by reason of pending proceedings in the district court upon the petitioners' motion, pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial based upon newly discovered evidence. The record also includes all proceedings in the Court of Appeals, including petitioners' motion to remand to the district court, which was submitted to the Court of Appeals prior to the argument of the appeal in that court. See footnote 2 in the opinion of the Court of Appeals, Appendix A, *infra*.[1]

Pretrial Proceedings and the Facts Related thereto.

Immediately following the arraignment of the defendants on March 24, 1970, and at other times prior to trial, certain of the defendants filed several pretrial motions in which all joined. Among these motions (the full text of

[1] The attention of the Court is respectfully invited to petitioners' motion to defer consideration of this petition, *infra*, pp. 31-32, pending the final disposition of the new trial motion proceedings in the court below.

which are reproduced in the Joint Appendix before the Court of Appeals,[2] pp. I-27 through I-77) are the following:

(1) Motion to dismiss (paragraph 1) pursuant to Rule 12(b)2, Federal Rules of Criminal Procedure, to dismiss "Count 1 of the indictment, on the ground that said count contains multiple conspiracies, which, thereby constituting a misjoinder of counts into one pleaded count, all as set forth in detail in the annexed affidavit of Daniel H. Greenberg" (I-28); and

(2) Motion for severance (paragraph 5) pursuant to Rule 14, Federal Rules of Criminal Procedure, "for an order granting . . . a severance of trial as to the conspiracy alleged in Count 1 of the indictment in which said defendants Howard Silverman and William Silverman are named, separate and distinct from the trial of the other conspiracies alleged and set forth in said Count 1, and as to which said defendants Howard Silverman and William Silverman are not named as defendants or co-conspirators." (I-29.) These motions were denied on July 14, 1970 (I-4).

(3) Motion to interview Gerald Martin Zelmanowitz, in which counsel for the defendant Salerno raised the question of identification of that defendant (I-36—I-41). This motion was denied on November 29, 1971 (I-5).

(4) Motions to dismiss the indictment were filed first on behalf of defendant Salerno on March 16, 1972, and thereafter on behalf of the Silvermans on March 31, 1972, with a supporting affidavit of Daniel H. Greenberg, pursuant to the Sixth Amendment to the Constitution and Rule 48(b), Federal Rules of Criminal Procedure (I-41—I-44). Proceedings were held thereon before District Judge Anthony

[2] All references hereinafter made will be to the volume and page of the Joint Appendix (more properly denominated Consolidated Appendix) unless otherwise noted.

T. Augelli, on April 10, 1972 (I-44—I-56). These motions were denied April 12, 1972 (I-57), with *caveat* that all parties proceed immediately to the "new Chief Judge" to fix a peremptory trial date. See Greenberg affidavit of October 6, 1972, for these proceedings. The motions were renewed with an additional affidavit of Daniel H. Greenberg dated October 6, 1972, with exhibits annexed thereto (I-58—I-77) and were denied by the trial judge on October 11, 1972 (I-9).

On October 11, 1972, just before the selection of the jury commenced for the trial of this case, the government filed the following motions, all of which were granted: 1) to sever the defendants Beckley, Green and Zelmanowitz from the trial; 2) to dismiss count 4 from the indictment; and 3) for sequestration of the jury, which was opposed by defendants, but granted after a hearing (I-9, I-10).

THE CONDUCT OF THE TRIAL AND THE FACTS RELATED THERETO.

The selection of the jury was completed on October 11, 1972, and on the following day the openings were made. During the government's opening, the prosecution, represented by Assistant United States Attorney Langway, repeatedly emphasized that the defendant Anthony Salerno was the "key man," a central figure "who had the last word" in the alleged conspiracy on account of his "criminal association and contacts." (II-5-6, 13-16.)

The introduction of evidence began on October 12, 1972.

On October 17, 1972, the defendants Mase (Maislich) and Bressler retracted their pleas of not guilty and pleaded guilty to count 1 of the indictment (II-687, II-690). In both cases the government agreed to dismiss the substantive counts charged against the two defendants (II-687—II-691). Mase stated, when being questioned by the court in the allocution as to his reason for pleading guilty, that he only

knew, and had only spoken to, one of the defendants involved in the proceeding—Beckley (II-688, II-689). Bressler stated, when asked the same question, that, other than Zelmanowitz, he "never saw or heard of any of the other defendants until the arraignment time, which is the first time [he] ever saw or heard any of them." (II-691.)

Subsequent to the guilty pleas of Mase and Bressler, the government called its main witness, Zelmanowitz, to the stand (II-21). Shortly after taking the stand Zelmanowitz declined to identify Anthony Salerno as the person with whom he allegedly conspired (II-38—II-43).[3] As a result of this the defendant Salerno was severed from the trial as follows:

> "Mr. Stern: If it pleases the Court, I've consulted with my superiors in Washington, as I requested your Honor's permission to do, and I have their authority and permission to make the following application.
>
> "If counsel for the defendant Salerno still press their motion for a severance, I am authorized to consent and join with their motion to sever this case from this trial at this time.
>
> "Mr. Conway: We so move, sir.
>
> "Mr. Stern: I so join. Both parties consenting.
>
> "The Court: Very well. I will sever the defendant Salerno and instruct the jury appropriately that he has been severed from the case.
>
> "That means, Mr. Conway, that you and Mr. Peluso and, of course, Mr. Salerno, are then free—" (II-43).

Thereupon, based on the indictment and the prosecution's opening, the remaining defendants moved for a mistrial

[3] The circumstances of Zelmanowitz's refusal to identify Salerno and his subsequent testimony before the United States Senate Permanent Investigating Subcommittee constitute the heart of the petitioners' new trial proceedings, referred to herein.

(II-44—II-122). In commenting on the defendants' motion for mistrial, the prosecutor stated as follows:

> "Mr. Langway: The severance of the defendant Salerno has no effect upon the testimony that will be produced henceforth in this trial, and I believe that the allegations in the indictment with respect to this conspiracy will be supported from the evidence that comes forward from the witness stand, as this trial proceeds, and I see at this time no reason to speculate that the Government will be unable to prove its case as outlined in its opening statement." (II-51.)
>
> "Mr. Langway: In light of the last severance, your Honor, I don't know on what basis the defense contends there would be no evidence to support the government's statement.
>
> "The Court: They didn't say that at all.
>
> "Mr. Langway: The defendant Salerno is still involved in this case, your Honor. The testimony from the witness stand will be evidence of that. The fact that he is no longer a defendant in this case has no significance with respect to the testimony. He is named as a co-conspirator. He is still a defendant. The testimony that will be adduced from the witness stand through the defendant co-conspirator Zelmanowitz will bear on Mr. Salerno and his role in this conspiracy. The reasons for severing at this time have no bearing whatsoever on what the testimony of Mr. Zelmanowitz will be." (II-54.)

Thereafter, in the course of argument on the motion for mistrial, Mr. Conway, counsel for Salerno, and Mr. Stern, United States Attorney, were called to the stand by the defendants and it was established that the government had reason to believe that Salerno was innocent and that it

would dismiss the charges against him if within a 60-day period additional information concerning Salerno's guilt was not obtained (II-83—II-86).[4] In spite of the way in which the severance of Salerno occurred, the defendants' motion for mistrial upon the "totality of the circumstances" was denied (II-119—II-122).

When the direct examination of Zelmanowitz continued, he gave evidence as follows. The alleged conspiracy involved four separate transactions, with Salerno, Beckley, Green and Zelmanowitz involved in each transaction (II-127—II-556). The first transaction involved the aforementioned four men and Jack Mase. Mase sold stolen securities to Beckley and Green who entered into a partnership arrangement with Zelmanowitz, whereby they would provide the securities and Zelmanowitz would prepare them for sale and sell them. They agreed that Salerno was to insure that the stolen securities were not on any lists and was to provide the necessary protection to hold the suppliers accountable in the event anything went wrong. The four of them were to divide the proceeds of their endeavor (II-147—II-149). This "transaction" was a success, and at the conclusion of a meeting between Zelmanowitz, Beckley, and Green, at which time the proceeds were divided, the three left with the thought that they might do some business in the future (II-162—II-167).

The second transaction occurred approximately one month after the first. He gave evidence as follows. Beckley

---

[4] The defendants argued, in support of their motions, that Salerno was not merely severed, but that the indictment against him was going to be dismissed because the government believed him to be innocent. The government argued that this was not so, and that Salerno was still a defendant, merely severed from this proceeding, and that he played a role in the conspiracy.

The indictment was dismissed as to Salerno on January 8, 1973 (I-15, I-95, I-96).

told Zelmanowitz of a "Boston man" who could provide stolen United States treasury bonds. This man was the defendant, Rossi, and since Zelmanowitz had never heard of him, he asked Salerno to check on him. Selerno did this through a Boston connection of his. Zelmanowitz then allegedly met with Rossi and Beckley, and, thereafter, Beckley purchased the treasury bonds from Rossi. Zelmanowitz then took the bonds from Beckley and went through his procedure of selling them. This venture was successful and Salerno, Beckley, Green and Zelmanowitz once again split up the proceeds of the sale. After this second successful venture the four men had dinner together, at which time they discussed the success of their purchases and sales of the stolen securities (II-168—II-186).

There was no evidence that Rossi or the Silvermans were aware of the first transaction when Rossi allegedly entered into the second transaction; and Rossi and Maislich each testified that they had never seen or heard of each other or the Silvermans prior to their arraignment (II-688, II-692).

Zelmanowitz next testified about a third transaction which occurred approximately two months after the first, and a month after the second. Once again, Beckley, Green, Salerno and Zelmanowitz were involved, each playing the same part he had in the prior transactions. This transaction began when Green told Zelmanowitz he could obtain more stolen securities. These were to come from Howard and William Silverman, both of whom were known by Beckley and Salerno. William Silverman purportedly met with Beckley, Green and Zelmanowitz to discuss the sale of Indiana Toll Road bonds. The bonds were eventually bought from William Silverman by Green and given to Zelmanowitz, who attempted to sell them (II-189—II-201). These bonds were discovered to be counterfeit, and it was

Zelmanowitz's dealings with respect to them which led to his arrest by the F.B.I.

Rossi had no knowledge of this transaction and the Silvermans and Rossi testified that they had never seen or heard of each other prior to their arraignment (II-693, II-694, II-695).[5]

The last transaction allegedly involved the four men active in all prior transactions, along with Bressler and Rossi but not the Silvermans. This transaction allegedly took place over a period of time which began approximately five months subsequent to the earlier transaction with Rossi. The testimony of Zelmanowitz with regard to this transaction was as follows. Beckley and Zelmanowitz travelled to Boston to discuss the purchase of stolen securities with Rossi. Beckley inquired of Rossi as to a partnership arrangement among Rossi, himself and Zelmanowitz, whereby Rossi would give them the securities they had been discussing for Zelmanowitz to sell, and after the sale the proceeds would be divided. Rossi declined this offer, desiring simply to sell them the securities at a fixed price (II-238—II-242). Securities of a value of almost two million dollars were purchased from Rossi in Revere, Massachusetts. These included securities of General Electric, American Motors, Cities Service, Standard Oil of New Jersey, Gillette, Sears Roebuck, and Northeast Airlines. Thereupon, Zelmanowitz, accompanied by Bressler, trans-

---

[5] The government did not contend that Rossi was ever aware of this alleged transaction between the Silvermans and the group of Beckley, Green, Zelmanowitz and Salerno. This is shown by the following colloquy between the court and Mr. Hinden, Assistant United States Attorney:

"The Court: Where does Rossi come into the Indiana Toll bond situation?

"Mr. Hinden: Your Honor, Rossi, as far as we know, there is no affirmative evidence in the case that he knew about the Indiana Toll Road bonds." (II-590.)

ported various portions of these securities to Miami Beach, New Orleans, and Atlanta in attempting to get rid of them (II-244—II-293).

This was the only evidence of the government concerning the transactions and there was no evidence connecting Rossi with the defendants Maislich, Howard Silverman or William Silverman. Zelmanowitz alone stood as the source of all proof as to all defendants. Zelmanowitz stated he met the Silvermans through Green (II-189) and they procured the counterfeit Indiana Toll Road bonds, which he tried to sell to Edwards and Hanley, but for which he was arrested instead (II-190—II-216). He then complained to Salerno, who ordered Howard Silverman to bring his father or he would "break his leg." (II-222.) The Silvermans both denied the transaction. This was the only testimony or transaction purporting to link the Silvermans to the Zelmanowitz transactions.

At the conclusion of the testimony of Zelmanowitz the government restated its case. Each of the defendants then filed motions for mistrial and for acquittal (II-557—II-579). The motions were based on the following: 1) the defendants were prejudiced by the severance of Salerno and by not knowing whether he—the sometime defendant Salerno —was part of the case or not; 2) there was no evidence of any understanding prior to the sale of any securities, or at the time they were sold, so as to constitute a conspiracy to sell the particular securities; 3) evidence was allowed in as to transactions which did not involve, or show any connection among specific defendants; 4) the evidence showed multiple conspiracies involving different parties and not a single conspiracy; 5) the evidence showed only that a defendant sold to a conspiracy. All motions of the defendants for mistrial and for acquittal were denied (I-11, I-12).

Each of the remaining defendants, the petitioners herein, testified in his own behalf. They all denied the essential testimony of Zelmanowitz and denied any participation in any criminal transaction.

The Requested Jury Instructions.

At the conclusion of the defendants' evidence the defendants submitted requests to charge. Among these was the following:

Silverman No. 9:

"Count One of the indictment charges all the defendants named therein with participating in a single, overall conspiracy during the period from on or about January 1, 1968, and continuously thereafter up to on or about December 31, 1969. It charges, in effect, that all of the acts enumerated in that count were part of this single conspiracy and that the aims of this central conspiracy were the commission of crimes, in violation of Title 18, United States Code, § 2314 and 2. This is the only conspiracy with which the defendants named in this count are charged, and, if you do not believe that the evidence has established beyond a reasonable doubt the existence of this conspiracy, you must find the defendants innocent on this count.

"In analyzing the evidence, you must determine whether there was a single continuing overall conspiracy or separate independent conspiracies with separate and distinct groups involved, with no overall central purpose. If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged in the indictment; and in that case, you must return a verdict of not guilty as to all of the defendants under the conspiracy count." (I-82—I-83.)

All defendants joined in each defendants' requests to charge. The foregoing request was denied.

The defendants specifically took exception to the trial court's refusal to charge the jury in any manner relating to multiple conspiracies (II-636—II-638, II-679).

After the verdicts of guilty, the defendants moved for a new trial, renewing their contentions relating to the Salerno mistrial, the multiple conspiracies and the matter of sale to a conspiracy. These motions were denied (I-15, I-95—I-96).

Reasons for Granting the Writ.

This case concerns the constitutional issues set forth in the questions presented and, to an important extent, the integrity of the administration of federal criminal justice through the use of improper litigation means and tactics on the part of the government prosecutors. As such the issues in this case transcend the ordinary problems in criminal prosecutions and directly concern the basic concepts of due process of law. This Court's supervisory function over the administration of federal criminal justice is directly involved in this case.

1. In the Totality of the Circumstances of this Case, Petitioners were Denied Substantial Due Process of Law and a Fair and Impartial Speedy Trial, as Mandated by the Fifth and Sixth Amendments to the Constitution, Especially in Light of the Proceedings Incident to the Mistrial of the Defendant Salerno.

It is not usual in a trial conducted in a federal court for defendants to contend that they were deprived of a fair trial. Yet the totality of the circumstances of this particular

case requires that the defendants make that claim here as petitioners for a writ of certiorari. A fair reading of the entire record of these proceedings, from the initial pretrial motions addressed to the indictment and for pretrial discovery, through the final posttrial motions to set aside the verdict, compels the conclusion that in the constitutional sense of due process of law these defendants were denied that fundamental right.

When we consider the unseemly delay by the government and the court in bringing this case on for trial, precipitated only by the several motions of the defendants to dismiss the indictment for want of a speedy trial; when we view the futile attempts of Salerno's counsel to view and interview Zelmanowitz; when we consider the government's sequestration of the jury for the improper purpose or with the damaging result of enhancing the importance of this case out of all proportion to its true position; when we analyze the allegations of the indictment as to Salerno's importance to the alleged conspiracy "by virtue of his criminal associations and contacts, would guarantee the timely procurement of such stolen securities and provide such protection as was necessary for said enterprise" (I-20); and when we consider the bizarre circumstances under which Salerno was granted a mistrial, severance of trial and ultimate dismissal of the indictment, with the government still insisting he was the kingpin of the indictment, we can only argue that the totality of the circumstances show a denial of due process which warrants a new trial for these defendants.

Due process of law is not limited only to redressing outrageous conduct, such as the use of coerced confessions, mob domination of the trial, improper newspaper publicity, use of stomach pumps to extract evidence and similar extraordinary incidents. See *Moore* v. *Dempsey,* 261 U.S.

86 (1923); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Smith* v. *O'Grady*, 312 U.S. 329 (1941); *Waley* v. *Johnston*, 316 U.S. 101 (1942); *Rochin* v. *California*, 342 U.S. 165 (1952); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), among others. The concept of due process, emanating from Magna Carta through the Fifth Amendment bespeaks fundamental fairness in the conduct of cases. Without it justice and democracy are lost.

It is the petitioners' argument in this case that at the time the mistrial and severance of trial as to defendant Salerno was declared, precipitated as stated above by the actions and conduct of the United States Attorney and by the refusal of Zelmanowitz to identify Salerno, the then-immediately-made motion of the remaining defendants for a mistrial and for the renewal of the trial immediately should have been granted. The prosecutors opposed this motion in order to save or salvage for themselves the great psychological advantage they had developed by the entire circumstances of the case up to that point. To begin again with a new unsequestered jury, without the presence at the trial of Salerno, Mase and Bressler (the other guilty-pleading defendants) would have resulted in this case being tried on the merits only as to the Silvermans and Rossi. This new trial might have allowed a jury to assess the guilt or innocence of these remaining defendants only on the evidence as to them, without the atmosphere generated in a trial in which the reputed underworld chieftain Salerno was present. The prosecutor clearly was not desirous of having this case tried only on the merits; his conduct throughout the trial demonstrates this. See *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

Thus, under the totality of the circumstances of this case, the petitioners submit that they were denied substantial due process of law and a fair and impartial speedy trial as

mandated by the Fifth and Sixth Amendments to the Constitution, for, as Mr. Justice Black put it, they were denied "the appearance of justice," as well as the substance of justice. *In re Murchison,* 349 U.S. 133, 136 (1955); *Offutt* v. *United States,* 348 U.S. 11 (1954).

2. It was Prejudicial Error for the Trial Judge to Refuse to Submit to the Jury, as Requested by Petitioners, the Factual Issues of the Nature and Scope of the Conspiracy Count as Constituting a Single or Multiple Conspiracy and Petitioners' Requested Jury Instructions thereon; the Proof Established as a Matter of Law that there were Several Separate and Distinct Conspiracies.

As has been set forth in this petition, a specific request was made to the trial judge that he charge the scope of the conspiracy to the jury. The court refused to charge the jury on this point. This refusal was plain error. *United States* v. *DeCavalcante,* 440 F. 2d 1264 (3d Cir. 1971); *United States* v. *Boyance,* 329 F. 2d 372 (3d Cir. 1964), affirming 215 F. Supp. 390 (E.D. Penn. 1963); *Lefco* v. *United States,* 74 F. 2d 66, 69 (3d Cir. 1934); *United States* v. *Crosby,* 294 F. 2d 928, 945 (2d Cir. 1961); *United States* v. *Varelli,* 407 F. 2d 735, 747-748 (7th Cir. 1969); *United States* v. *Borelli,* 336 F. 2d 376, 384 (2d Cir. 1964).

The rule was most succinctly stated in the *Crosby* case, where the court wrote:

> "Whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." (294 F. 2d, at 945.)

Thus, it was necessary for the jury to be given proper instructions under which they could properly discharge their duties. The refusal of the trial judge to submit to the jury

the issue of fact as to the nature and scope of the conspiracy, especially in light of the evidence at the trial, was clearly prejudicial error.

The various Courts of Appeals have on many occasions held and declared that the scope of a conspiracy, as to whether it is one or more than one, is a question of fact for the jury, to be presented to it under proper instructions. The leading case on this point in the Third Circuit is *Lefco* v. *United States*, where Circuit Judge Wooley wrote, at page 69:

> "Whether the proofs establish the conspiracy alleged by an indictment or establish several conspiracies not alleged may, however, be a valid question and in such case it is a question of fact for the jury. *United States* v. *McConnell* (D.C.) 285 F. 164. In the instant case the learned trial judge, in response to the defense of separate conspiracies, submitted that question to the jury on instructions which were clear, direct and adequate, and the jury found the single conspiracy alleged by the indictment and accordingly convicted the defendants."

In the *Boyance* case, *supra*, the Third Circuit affirmed the district court's submission of this issue to the jury and, in denying the defendant's motion to set aside the verdict, the district court wrote as follows:

> "Whether or not the proof in a particular case establishes a single conspiracy charged in an indictment or establishes several conspiracies which have not been charged is a question of fact for the jury. *Lefco* v. *United States, supra*, 74 F. 2d at page 69. The issue here was submitted to the jury with instructions that the essence of a conspiracy 'is a common design and

purpose applicable to all members' and if the jury found that any of the defendants were not members of the single conspiracy here charged but were members of a separate conspiracy not charged, those defendants should be acquitted. No exceptions were taken to the charge although full opportunity was given to take exceptions or to request additional instructions. By its verdict, the jury found that all the defendants, including Feldman, were participants in the single conspiracy charged in the indictment. There is ample support in the record for the jury's finding." 215 F. Supp., at 395.

Notwithstanding this jurisprudence, the Court of Appeals here failed to apply its own standards to this case. In view of the evidence in this case establishing at most several separate conspiracies rather than a single overall plan, the issue is of such moment as to justify review on certiorari by this court.

It is, the petitioners submit, nearly 30 years since this Court expounded its views in *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1964):

> "When many conspire, they invite mass trial by their conduct . . . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian instructions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, in-

cluding those surrounding criminal trials. About them we dare not be careless or complacent when that fashion has become rampant over the earth."

Since the decision in *Kotteakos* there have been a score of cases which have dealt with this issue. The cases which have found multiple conspiracies, rather than a single conspiracy, generally involved situations similar to the present one where there is no connection among the transactions that occurred and no proof of a common overall scheme. See *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969).

Analysis of the proof as well as of the indictment supports petitioners' contentions in this regard. Although defendant Mase pleaded guilty during the trial, the proof of his alleged criminal transaction with Zelmanowitz was placed before the jury subsequent to his guilty plea. (See II-1586—II-1624). The substantive count in which Mase was named, count 2, was dismissed from the case, but the proof of the transaction was received, ostensibly as being in furtherance of the conspiracy, after his guilty plea. Neither the Silvermans or Rossi were involved or mentioned in the Mase transaction.

The Silvermans were not involved in the Rossi transactions and Rossi is not mentioned in the Silvermans' transaction. To join them together simply because of the Zelmanowitz core or hub is in direct violation of the *Kotteakos*, rule, *supra*.

The petitioners wish to make one further argument on this question of multiple conspiracies, an argument which emphasizes the constitutional infirmity of failing to submit the issue to the jury. As the case of *United States* v. *Griffin*, 464 F. 2d 1352 (9th Cir. 1972) shows, when the jury is instructed that it may find separately defined conspiracies involving particular defendants carved out of the single

pleaded conspiracy, included among the instructions to the jury there must be one that evidence received as against others not found to be members of the particular conspiracy is not to be considered against the members of the conspiracy under consideration. This type of instruction, mandated by this kind of charge and trial, is, in effect, in violation of the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968), overruling *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), decreeing that in such circumstances a separate trial is required. Here the defendants moved for a severance of trial numerous times, starting with their pretrial motions and several times during the course of the trial. The rationale of this rule is that only competent, relevant and material evidence as against particular defendants should be received at their trial; and absent such competency, relevancy and materiality, a separate trial is mandated. Rule 14, Federal Rules of Criminal Procedure. The scope of such a rule of law should be granted full review by this Court for the future guidance of lower courts within the federal judiciary.

3. As a Matter of Law there was a Material Variance between the Allegations of the Conspiracy Count and the Proof Submitted in Support thereof as to Petitioners' Participation in the Scheme by their Alleged Sales to the Conspiracy.

An examination of the indictment in terms of an alleged single, all-embracing overall conspiracy, leads to the conclusion that the facts show that the petitioners did not so conspire but, at most, could have been found to be sellers to a conspiracy. *United States* v. *Falcone,* 311 U.S. 205 (1940), affirming 109 F. 2d 579, 581 (2d Cir. 1940, L. Hand, C.J.); *United States* v. *Peoni,* 100 F. 2d 401 (2d Cir. 1938);

United States v. *Koch*, 113 F. 2d 982 (2d Cir. 1940); *United States* v. *Zeuli*, 137 F. 2d 845 (2d Cir. 1943); *United States* v. *Gerke*, 125 F. 2d 243 (3d Cir. 1942); *United States* v. *Ford*, 324 F. 2d 950 (7th Cir. 1963); *United States* v. *DeCavalcante*, 440 F. 2d 1264, 1269-1272 (3d Cir. 1971), and cases cited therein; *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969), among others. Note, *Falcone Revisited; The Criminality of Sales to an Illegal Enterprise*, 53 Col. L. Rev. 228, 233 (1953). Cf. *United States* v. *Giuliano*, 263 F. 2d 582 (3d Cir. 1959); *United States* v. *Carlucci*, 288 F. 2d 691 (3d Cir. 1961).

The distillation of the law exemplified by the foregoing cases and others, is that mere sales to a conspiracy already in progress do not make the sellers members of the criminal enterprise. The Columbia Law Review article, *supra*, 53 Col. L. Rev. 228, 233, stated the rule to be:

> "Where the theory is joinding a larger conspiracy by agreement or forming one *inter sese* the Courts have consistently required a showing of further association with the conspiracy over and above the mere sale."

In this case there is no evidence that any of the defendant groups did more than sell to a conspiracy. The Silvermans were acquitted of both substantive counts. They and Rossi denied their participation in the substantive offenses and in the conspiracy itself. The convictions of petitioners rested exclusively upon the testimony of Zelmanowitz. His credibility constitutes one of the key issues in this case.

It would seem to be appropriate at this point to repeat the remarks of Judge Learned Hand in *United States* v. *Falcone*, *supra*, at 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment

merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

Even if we accept arguendo the government's theory that a single-act sale to a conspiracy can be enough to make one a member of it, that rule would apply only in those instances where the sale is clearly of contraband, such as narcotics. The cases cited above hold that, in the circumstances of cases such as this one, the single or even the separate and distinct acts of sale do not make one a member of the conspiracy.

The foregoing statement of the law by Judge Learned Hand is perfectly valid today, especially when considered in terms of the pervasive conspiracy indictment in this case, with its purple prose allegations of Salerno's "criminal associations and contacts" and "protection" for the alleged enterprise, none of which related to Rossi or the Silvermans.

4. In the Circumstances of this Case the Failure of the District Court and the Government to Afford Petitioners a Speedy Trial Violated their Constitutional Rights Guaranteed by the Sixth Amendment to the Constitution, as Delineated by this Court's Decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972).

All of the circumstances of this case reflect the dire consequences to the defendants resulting from the failure of the district court and the government to afford them their constitutionally mandated speedy trial. At the time their motion to dismiss the case for want of a speedy trial was renewed before the trial judge, this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), had already been published. The papers and proceedings in this case demonstrate clearly the efforts made by the various defendants to obtain a speedy trial, and the thwarting of that effort by the conduct of the prosecutor in this case is also apparent. It is to be noted that the facts at issue in this indictment took place as early as January 1, 1968, and not later than December 31, 1969 (I-9). The defendant Zelmanowitz, the sole witness against the defendants, was arrested in June, 1968, while trying to sell some of the securities in this case. Thus the United States knew about this alleged transaction at that time. The indictment, however, was not filed until March 6, 1970 (I-1), approximately 20 months later. Further, as to other activities of Zelmanowitz occurring at the same time as some of his alleged activities in this case, the attention of the Court is invited to the opinion in *United States* v. *DeCarlo*, 458 F. 2d 358 (3d Cir. 1972).

An analysis of the four factors delineated by Mr. Justice Powell in *Barker* v. *Wingo* in terms of the subsequent events of this case shows the following (see I-65—I-67):

(a) *Length of delay:* From the government's knowledge of the transaction to the date of trial: approximately June 12, 1968, to October 11, 1972—4 years, 4 months; from date of indictment to date of trial—March 4, 1970, to October 11, 1970—2 years, 7 months, 7 days.

(b) *Reason for the delay:* No valid reason assigned by the court or the government. Many newer or younger cases were tried before this one.

(c) *Defendants' assertion of rights:* The record clearly shows the efforts made by the defendants to have this case speedily tried. Initially, the Silvermans agreed with the government to try this case commencing March 1, 1971, but this date was cancelled without notice or the Silvermans' consent so that a politically more significant and junior case could be tried first. At no time did the government call the case for trial, and it was not until six months after the defendants' motion to dismiss the case that it was finally called for trial. The defendants never consented or acquiesced in a delay of this trial. It was the defendants who sought either trial or dismissal starting in the fall of 1970. It is clear that the defendants have asserted over and over again their right to a prompt and speedy trial.

(d) *Prejudice to the defendant:* The only transactions in which the petitioners are named in this indictment allegedly occurred in the year 1968. Their ability to recall facts and events diminished with each passing day. All defendants testified as to the more than four-year-old events as best they could. The delay was particularly damaging to defendant Howard Silverman, and infected the entire proceedings (see the record hereon, II-2491—II-2613). See also *Moore* v. *Arizona*, No. 73-5002, dec. November 5, 1973, by the Court unan., 42 U.S.L.W. 3268.

On the now declared constitutional basis of a defendant's right to a prompt and speedy trial, it is undoubted that the

constitutional rights of the defendants here were violated by the failure of the district court and the government to afford them such rights. Accordingly, for this reason at least, review by certiorari is warranted.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted; subject however, to petitioners' motion attached hereto that the consideration of this petition be deferred pending the disposition of petitioners' proceedings, pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial on the ground of newly discovered evidence, now pending in the courts below.

Respectfully submitted,

MORRIS M. GOLDINGS,
Counsel for Petitioners.

November 20, 1973.

MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI.

Petitioners respectfully move the Court to defer consideration of the foregoing petition for a writ of certiorari for the reasons set forth herein.

The petition for writ of certiorari is being filed within the strict time limits fixed by Rule 22(2) of the Rules of this Court, without application for an extension of time to file this petition, notwithstanding the pendency at this time of proceedings in the courts below upon petitioners' motion, pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial on the ground of newly discovered evidence. The basis for the aforesaid motion for a new trial and the status of the proceedings in connection therewith in the courts below are as follows:

As appears from the factual statement of this case, *supra*, pp. 10-17, the witness Zelmanowitz was the principal witness for the government at the trial of petitioners and the only witness to give any testimony of alleged criminal conduct as to each of the petitioners. At the trial Zelmanowitz refused to identify defendant Salerno in the courtroom, pretending that it was in the courtroom for the first time that he could not make such identification. The prosecutor then claimed, in effect, that he was surprised at this development, and thereupon the trial as to Salerno was severed and subsequently the charges dismissed.

During July, 1973, after the appeal in this case was docketed in the Court of Appeals, but before argument, Zelmanowitz appeared as a witness before the United States Permanent subcommittee on Investigation and testified in effect (1) that the government had broken certain promises made to him relating to his testifying for the government, and (2) that he had told the prosecutor some time before

his court appearance that he would not or could not identify Salerno as the man with whom he dealt. Upon the publication in the press and other news media of Zelmanowitz's testimony before the Senate Subcommittee, petitioners obtained the official Senate transcript and filed their motion in the Court of Appeals to remand the case to the district court to enable them to make their Rule 33 motion. This motion was denied when the case was decided solely on the ground that it should be made first in the district court. See footnote 2 of the Court's opinion, Appendix A, *infra*, and the order denying the motion, Appendix B, *infra*.

Thereupon petitioners filed their new trial motion in the district court and the matter is now pending before that court. If petitioners are unsuccessful on this motion in the district court, they intend promptly to appeal to the Court of Appeals, and, if necessary thereafter, to include the Rule 33 proceedings in their case pending before this Court.

Since petitioners believe that piecemeal appeals are inappropriate and are to be deplored, and since the witness Zelmanowitz was the crucial witness at the trial, they respectfully submit this motion to defer consideration of this petition until such proceedings are concluded in the courts below or reach this Court.

Petitioners sought to have the motion based upon newly discovered evidence considered by the courts below before this case came on before this Court, but were not successful in this regard. See, *e.g.*, the procedure adopted by the Court in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and in particular the memorandum of Mr. Justice Frankfurter, 352 U.S. 1, 25, at p. 28.

Respectfully submitted,

MORRIS M. GOLDINGS,

Attorney for Petitioners.

November 20, 1973.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1195, 73-1196 and 73-1197

UNITED STATES OF AMERICA

v.

ANTHONY SALERNO, ANGELO ROSSI, JR.,
GILBERT LEE BECKLEY, JOSEPH GREEN,
HOWARD SILVERMAN, WILLIAM SILVERMAN,
JACOB MAISLICH, LARRY BRESSLER,
GERALD MARTIN ZELMANOWITZ

Howard Silverman, *Appellant* in No. 73-1195
William Silverman, *Appellant* in No. 73-1196
Angelo Rossi, Jr., *Appellant* in No. 73-1197

(D. C. Criminal No. 116-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued September 5, 1973

Before HASTIE, VAN DUSEN and GIBBONS, *Circuit Judges.*

Daniel H. Greenberg, Esq.,
New York City, N.Y.,
Attorney for Appellants in
Nos. 73-1195 & 73-1196
Morris M. Goldings, Esq. and
Robert A. Saggese, Esq.,

Mahoney, Atwood & Goldings,
Boston, Mass.
Attorneys for Appellant in
No. 73-1197
Herbert J. Stern,
United States Attorney, and
Richard S. Zackin,
Assistant United States Attorney,
Newark, N.J.,
Attorneys for Appellee

OPINION OF THE COURT

(Filed September 25, 1973)

PER CURIAM:

These appeals challenge judgment and commitment orders of the district court entered after jury verdicts had been returned finding the defendants-appellants Rossi, H. Silverman and W. Silverman guilty on Count 1 of the indictment, charging conspiracy to transport stolen securities in interstate commerce in violation of 18 U.S.C. § 371, and defendant-appellant Rossi guilty on various substantive counts (Counts 3, 6, 7, 8 and 9), charging the transportation of stolen securities in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. After careful consideration of the contentions of defendants-appellants,[1]

---

[1] The court has considered and rejected the contentions of defendant Rossi (appellant in No. 73-1197) that:

(a) he was prejudiced by the joinder of offenses and defendants for trial together, and the trial judge erred in denying the numerous motions for severance of the defendants made prior to trial;

(b) the trial judge erred in denying defendants' application for mistrial subsequent to the severance of Anthony Salerno from the trial;

we have concluded that the record requires the affirmance of the judgments and commitments of the district court.[2]

(c) subsequent to the severance of Anthony Salerno, there was a change of the elements of the crime charged, which constituted an improper amendment to the indictment;

(d) the trial judge erred in denying defendant's motion for an order setting aside the verdict of the jury as to Count 1 and for entry of a judgment of acquittal, as the evidence established, at best, that the defendant merely sold to a conspiracy, and was insufficient to warrant his conviction on the conspiracy count;

(e) the trial judge erred in denying defendant's motion for an order setting aside the verdict and the entry of a judgment of acquittal as there was a variance between the indictment, which charged a single, overall conspiracy, and the proof, which, at best, established several separate and distinct conspiracies; and

(f) the trial judge should have instructed the jury on multiple conspiracies.

The court has also considered and rejected the contentions of defendants Howard and William Silverman (appellants in Nos. 73-1195 and 73-1196) that:

(a) the totality of the circumstances of the case denied appellants substantial due process of law and a fair and impartial speedy trial, as mandated by the Fifth and Sixth Amendments to the Constitution;

(b) it was prejudicial error for the trial judge to fail to instruct the jury, as requested by appellants, that the scope of the conspiracy count, as establishing one conspiracy or several, was for their determination;

(c) the proof established as a matter of law that the appellants Silverman were not members of the conspiracy alleged in the indictment;

(d) there was a material variance between the allegations of the conspiracy count and the proof submitted in support thereof, insofar as appellants Silverman are concerned; and

(e) the failure to afford appellants a speedy trial violated their constitutional rights guaranteed by the Sixth Amendment to the Constitution.

Each appellant also expressly adopted the arguments of his co-appellants. The court has considered and rejected each of the above arguments insofar as it relates to each appellant.

[2] While the appeal in the present case was pending, the appellants filed a motion for remand to the district court so that the

Appellants contend, *inter alia*, that the evidence at trial was insufficient to prove that they were members of the overall, single conspiracy charged in the indictment in that the evidence established at most that they participated in separate, multiple conspiracies. In analyzing this contention, this court must view the evidence "in the light most favorable to the prosecution in order to sustain the conviction." *United States* v. *DeCavalcante*, 440 F.2d 1264, 1273 (3d Cir. 1971). The evidence at trial established that co-defendants Zelmanowitz, Green, Beckley and Salerno (all severed from the trial for various reasons) were at the core of a conspiracy formed to procure stolen securities of various types for subsequent sale to unsuspecting brokerage houses. Each of these individuals performed a specialized function in furtherance of the conspiracy. Green and Beckley were continuously pursuing stolen securities which, when found, were purchased and turned over to Zelmanowitz for resale after Salerno had checked out the reliability of the seller. The evidence further established, largely through the testimony of co-conspirator Zelmanowitz, the Government's main witness, that defendant Rossi supplied the core group with stolen securities on two occasions and that appellants Silverman supplied the core group with counterfeit securities on one occasion.

Appellants Rossi and Silverman argue that they were not members of the overall conspiracy because they merely sold to a pre-existing conspiracy without knowledge of the members or scope of this conspiracy. The appellants rely

---

district court might pass upon a motion for a new trial based upon newly discovered evidence. This motion will be denied, since it is well-settled procedure that remand is proper only after the district court has ruled on such motion for a new trial. See *United States* v. *Scott*, 460 F.2d 45, 48 at n.3 (3d Cir. 1972); *United States* v. *Conway*, 415 F.2d 158, 166 (3d Cir. 1969), *cert. denied*, 397 U.S. 994 (1970); *United States* v. *Frame*, 454 F.2d 1137 (9th Cir.), *cert. denied*, 406 U.S. 925 (1972).

upon the case of *United States* v. *Falcone*, 311 U.S. 205 (1940), in which the Supreme Court held that mere selling of materials to a conspiracy, even where the seller has knowledge that the materials sold would be used illegally, does not render the seller a participant in the conspiracy absent knowledge of the conspiracy itself. Subsequently, however, in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), the Supreme Court rejected the argument that one who sells articles used by a conspiracy cannot be found guilty of that conspiracy. The Court indicated that one who does sell to a conspirator with knowledge of the conspiracy can become a party to the conspiracy by aiding and abetting it. *Id.* at 709. The district court properly charged on this permissible basis of guilt.

In the present case, there is ample evidence in the record to establish that appellant Rossi knowingly participated in the overall conspiracy. Rossi met with Zelmanowitz and Beckley on numerous occasions to discuss the sale of stolen securities, made two such sales to Zelmanowitz and Beckley, was expressly told that the securities would be resold by Zelmanowitz, and supplied Zelmanowitz with false identification in order to facilitate the resale. Similarly, there is ample evidence in the record indicating that appellants Silverman aided and abetted the conspiracy by selling to conspirators with full knowledge that they were dealing with a conspiracy. First, in negotiating and consummating the sale, they dealt directly with two members of the conspiracy, Zelmanowitz and Green. Second, they were clearly informed that Zelmanowitz and Green would deal only in securities which were not on any lists of stolen securities and that Zelmanowitz intended resale through a brokerage firm. Moreover, although thy were paid immediately upon delivery of the securities to Zelmanowitz and Green, there was testimony indicating that their receipts would be a

certain percentage of the proceeds realized upon resale by the core conspirators, thus linking the success of their venture to the success of the conspiracy's ultimate resale. The above was sufficient evidence upon which the jury could find that the Silvermans were members of the overall conspiracy.

Appellants also contend that the trial judge erred in refusing to instruct the jury that they should acquit appellants if they found separate conspiracies, rather than a single, overall conspiracy. An examination of the court's charge satisfies us that this claim is without merit. The court stressed in its charge that the Government alleged a single conspiracy and that the Government must show that each defendant was a "knowing part" of this conspiracy. Moreover, the trial judge carefully instructed the jury in determining whether a particular defendant was a member of the alleged conspiracy, they should consider only his acts and statements for he could not be bound by the acts or declarations of other participants until it was established that a conspiracy existed and that he was a participant in it. The risk of guilt transference was thus properly minimized. See *United States* v. *Morado*, 454 F.2d 167, 172 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Calabro*, 449 F.2d 885, 894 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047, *cert. denied*, 405 U.S. 928 (1972); *United States* v. *Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967).

Since we have found appellants other contentions to be without merit, the district court judgment and commitment orders will be affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1195 through 73-1197

UNITED STATES OF AMERICA
vs.
ANTHONY SALERNO, ANGELO ROSSI, JR.,
GILBERT LEE BECKLEY, JOSEPH GREEN,
HOWARD SILVERMAN, WILLIAM SILVERMAN,
JACOB MAISLICH, LARRY BRESSLER,
GERALD MARTIN ZELMANOWITZ

HOWARD SILVERMAN, Appellant in No. 73-1195
WILLIAM SILVERMAN, Appellant in No. 73-1196
ANGELO ROSSI, JR., Appellant in No. 73-1197

(D. C. Criminal No. 116-70)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
For the District of New Jersey

Present: HASTIE, VAN DUSEN and GIBBONS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed February 8, 1973, in cases Nos. 73-1195 and 73-1196 and on February 26, 1973, in case No. 73-1197, be, and the same are hereby affirmed.

ATTEST:
THOMAS F. QUINN
Clerk

September 25, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1195 through 73-1197

UNITED STATES OF AMERICA
vs.

ANTHONY SALERNO, ANGELO ROSSI, JR.,
GILBERT LEE BECKLEY, JOSEPH GREEN,
HOWARD SILVERMAN, WILLIAM SILVERMAN,
JACOB MAISLICH, LARRY BRESSLER,
GERALD MARTIN ZELMANOWITZ
HOWARD SILVERMAN, Appellant in No. 73-1195
WILLIAM SILVERMAN, Appellant in No. 73-1196
ANGELO ROSSI, JR., Appellant in No. 73-1197

Present: HASTIE, VAN DUSEN and GIBBONS,
Circuit Judges

Upon consideration of appellants' motion for remand to the District Court for the District of New Jersey, so that the said District Court may entertain and grant pursuant to Rule 33, Federal Rules of Criminal Procedure, a motion for a new trial based upon newly discovered evidence, and the brief in opposition thereto, both in the above-entitled case,

It is ORDERED that appellants' aforesaid motion to remand be, and hereby is denied, in accordance with the opinion of this Court. See note 2.

ATTEST:
THOMAS F. QUINN
Clerk

Dated: September 25, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1195/6/7

UNITED STATES OF AMERICA

v.

ANTHONY SALERNO, ANGELO ROSSI, JR., GILBERT LEE BECKLEY, JOSEPH GREEN, HOWARD SILVERMAN, WILLIAM SILVERMAN, JACOB MAISLICH, LARRY BRESSLER, GERALD MARTIN ZELMANOWITZ

Howard Silverman, Appellant in No. 73-1195
William Silverman, Appellant in No. 73-1196
Angelo Rossi, Jr., Appellant in No. 73-1197

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
VAN DUSEN
Judge

Dated: October 24, 1973